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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

HILLSBOROUGH LLC, Plaintiff and Respondent, v. MARCUS & MILLICHAP REAL ESTATE INVESTMENT BROKERAGE COMPANY, Defendant and Appellant.	E038589 (Super.Ct.No. RCV85860) OPINION

APPEAL from the Superior Court of San Bernardino County. J. Michael Gunn, Judge. Affirmed.

Cooper, White & Cooper LLP, William H.G. Norman, John M. Ross, and Patrick M. Rosvall, for Defendants and Appellants.

Irell & Manella LLP, Gregory R. Smith, Alana Hoffman; Arnold J. Rothlisberger for Plaintiff and Respondent.

1. Introduction

Defendant and appellant Marcus & Millichap Real Estate Investment Brokerage Company (broker) appeals after the trial court denied the broker's petition to compel arbitration in the action below. We affirm.

Plaintiff and respondent, Hillsborough, LLC (seller), owned three parcels of real estate, which it was interested in selling. One parcel was improved with a senior assisted-living facility, one parcel had a senior apartment complex constructed on it, and one parcel was vacant.

On or about February 11, 2004, the broker submitted a form "Representation Agreement" to the seller for its signature. The purport of the agreement was to grant the broker exclusive authorization for 180 days to sell or exchange the "portfolio" of the seller's properties.

The seller executed this agreement on February 11, 2004, and returned it to the broker. In so doing, the seller's representative initialed each page of the agreement in a space provided therefor at the bottom. The seller's representative also signed on the last page.

The broker's representative initialed each of the seven pages of the agreement, except for the last page. In addition, the broker's agent failed to sign the agreement in the space provided on the last page.

Paragraph 22 of the agreement provided for arbitration of any disputes, "with respect to the subject matter of this Representation Agreement or the transaction contemplated herein . . . ." The arbitration clause contained the required statutory notice

that, “By initialing in the space below you are agreeing to have any dispute arising out of the matters included in the ‘Arbitration of Disputes’ provision decided by neutral arbitration as provided by California law . . . .”

Paragraph 29 of the agreement expressly provided for other terms and conditions: “The commencement date of this contract shall be the date [the broker] receives this executed Representation Agreement from all Sellers *and countersigns this Representation Agreement.* Termination date shall be one hundred eighty (180) days (six months) from commencement date. [The broker] shall deliver written notification to seller of exact commencement date and termination date with fully executed contract.”

As noted, the broker did not “countersign” the agreement. The broker also failed to deliver written notice to the seller of the commencement and termination dates, as provided in paragraph 29.

Sometime after February 11, 2004, the seller did sell one of the parcels (the assisted living facility). The seller paid a commission to the broker, as provided in the purchase agreement, for that sale.

On September 20, 2004, 222 days after the seller signed the representation agreement, the broker presented a proposal for the sale of the two remaining parcels. The seller advised the broker that it did not wish to sell the remaining properties. The seller continues to own those properties.

The broker then demanded payment of a commission on the basis that it had delivered a buyer for the remaining parcels. The seller refused to pay, and filed the

action below for declaratory relief. The seller sought a declaration that no contract existed between the parties which would require the payment of a commission.

The broker filed a petition with the trial court to compel arbitration, pursuant to the arbitration clause contained within the representation agreement. The petition contained a request for a "Statement of Decision on the issues of law and fact giving rise to the Court's denial," if the court should deny arbitration.

The seller opposed the petition on the ground that, because the broker never signed the agreement and because it otherwise failed to comply with the express notice formalities required to make the contract term begin, no contract had been formed. As there was no contract, none of its terms were effective, including the arbitration clause. The seller argued, secondarily, that even if the representation agreement were effective, it had expired by its own terms, as the broker had presented its buyer more than 180 days after the seller had signed the agreement.

The broker contended that the agreement was valid because it had been fully executed, and because the parties had already performed under its terms. The broker also countered the expiration argument by asserting that the agreement had been extended.

The trial court denied the broker's petition to compel arbitration. After this ruling, the broker's counsel wrote a letter to the court, noting that no statement of decision had been issued. The court did not respond and no statement of decision was rendered.

The broker now appeals.

An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc.,[1] § 1294.2.) Here, the court's ruling did not resolve any disputed factual matters. "When there is no conflicting evidence regarding the interpretation of an arbitration agreement, we exercise our independent judgment to determine as a matter of law whether the agreement applies to a controversy." (*Provensio v. WMA Securities, Inc.* (2005) 125 Cal.App.4th 1028, 1031.)

B. The Trial Court Correctly Denied the Petition to Compel Arbitration

Section 1281.2 provides generally that, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists* . . . ." (Italics added.)

The trial court here denied the motion to compel arbitration, at least in part, on the ground that it had determined that no "agreement to arbitrate the controversy exists." Arbitration agreements, like other agreements, are governed by the rules generally applicable to the formation and construction of contracts. (*Platt Pacific, Inc. v. Andelson*, (1993) 6 Cal.4th 307, 313.)

An essential element of any contract is the mutual assent of the parties. (Civ. Code, §§ 1550, 1565.) That mutual assent is normally manifested by an offer communicated to the offeree and an acceptance communicated to the offeror. (1 Witkin,

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[1] All further statutory references will be to the Code of Civil Procedure unless

[footnote continued on next page]

Summary of Cal. Law (10th ed. 2005) Contracts, § 117, p. 156; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270-271.) Whether a contract has been formed is tested by objective expression or manifestation, not by the subjective unexpressed intentions of the parties. (*Zurich General Acc. & Liability Assur. Co. v. Industrial Acc. Commission* (1933) 132 Cal.App. 101, 104.)

The seller did manifest its assent by initialing each page, initialing some special provisions (such as the arbitration clause) and by signing the agreement at the end, and delivering it to the broker. The broker, on the other hand, did not objectively manifest full assent. The broker initialed six of the seven pages, and did initial the arbitration clause. Singularly absent, however, were the broker's initials on the last page and, most importantly, its signature at the end of the entire agreement.

The broker urges that it manifested its assent to the *arbitration clause* by initialing that paragraph, and thus that the issues of invalidity of the contract must themselves be decided by arbitration. (Citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 29 (*Moncharsh*).)

The broker overlooks, however, that it is the duty of the trial court, in the first instance, to determine whether a valid arbitration agreement exits. (§ 1281.2.) (*Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.* (1994) 25 Cal.App.4th 809, 816-817.) Necessarily, therefore, we are required to examine and construe the agreement to that limited extent. (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63,

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otherwise indicated.

69.) We do not thereby determine the merits of the underlying controversy (i.e., whether the seller has no duty to pay a commission because of the alleged invalidity of the contract), but only the threshold issue, present in every proceeding to compel arbitration, whether there is an agreement to arbitrate. (*Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 824-825.) In addition, the arbitration clause does not stand alone. That provision was a part of a larger contract. If the larger contract never came into being, then no valid agreement to arbitrate exists.

The broker argues that it is "no objection to arbitration . . . that the overall contract in which an arbitration clause appears may be illegal." (*Moncharsh*, *supra*, 3 Cal.4th at p. 29.) *Moncharsh*, is, in fact, to the contrary. *Moncharsh* states: "[S]ection 1281.2 requires enforcement of the *arbitration* agreement unless there exist grounds for revocation of that agreement. [¶] If a contract includes an arbitration agreement, and grounds exist to revoke the entire contract, such grounds would also violate the arbitration agreement. Thus, if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether. [Citations.] [¶] By contrast, when—as here—the alleged illegality goes to only a portion of the contract (that does not include the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable. [Citations.]" (*Moncharsh*, *supra*, 3 Cal.4th at pp. 29-30.)

Similarly, the broker may take no comfort from the pronouncements of the United States Supreme Court in *Prima Paint Corp. v. Flood & Conklin* (1967) 388 U.S. 395 [87 S.Ct 1801, 18 L.Ed.2d 1270], to the effect that contractual arbitration clauses generally

are enforced, even where a party seeks rescission of the entire contract on the grounds of fraud in the inducement, mistake, or duress. The rationale is that, unless the fraud goes to the inducement of the arbitration clause itself, the arbitration clause is severable from other portions of a contract, such that fraud relating to *other* terms of the contract does not render an arbitration clause unenforceable. (*Saint Agnes Medical Center v. Pacificare of California* (2003) 31 Cal.4th 1187, 1199.) "By entering into the arbitration agreement, the parties established their intent that disputes coming within the agreement's scope be determined by an arbitrator rather than a court, this contractual intent must be respected even with regard to claims of fraud in the inducement of the contract generally." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 416.)

The claim of fraud in the inducement applies to a contract that has been executed, such that the arbitration clause within the larger contract is otherwise valid. That threshold question of execution and validity is precisely what is in issue here, however. Unless the initial contract was found in the first instance, the arbitration clause is not "otherwise valid."

The broker argued below that real estate broker agreements need not be signed to be valid. The difficulty with this argument is that, although "any reasonable and usual mode [of acceptance] may be adopted" (Civ. Code, § 1582; *Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 499) where the contract does not specify a party's mode of acceptance, the contract here *does* specify the manner of acceptance. Where a contract does prescribe the manner in which acceptance is to be

communicated, "no other will suffice." (1 Witkin, *supra*, Contracts, § 189, p. 223, citing Civ. Code, § 1582 ["If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to . . . ."].)

The representation agreement here, in paragraph 29, specified that the broker must "countersign" the agreement, and that it must "deliver written notification to seller of exact commencement date and termination date with fully executed contract."

The broker failed to countersign the agreement. There was therefore no date upon which the contract "commenced." Where the agreement never "commenced," no contract was formed. The broker never showed that it had complied with the further condition to deliver written notice to the seller of the commencement and termination dates. In the absence of such notice and delivery, the contract was missing an essential term, and the seller never received the required communication of acceptance. No contract was formed.

The broker argues that the contract was accepted by partial performance of both parties, in that the broker procured a buyer for one of the parcels and the seller paid a commission to the broker as a result of that sale. The seller disputed that the commission paid was done pursuant to the representation agreement. The seller pointed out that the payment of a commission was provided for in the purchase agreement.

The broker urged that the purchase agreement "ratified" the representation agreement, but the clause upon which the broker relies does no such thing. It is, instead, an acknowledgment that the seller had not had contact, dealings, or any communication

with anyone about the property, except the broker here. The purport of the provision is that the seller would hold harmless the buyer against any commission claims raised by anyone other than the broker. It does not refer to, incorporate by reference, or otherwise "ratify" -- or even identify -- any other agreement to pay a commission. It does not establish that the commission was paid pursuant to the representation agreement at issue.

The broker failed to comply with the express terms provided in the representation agreement itself concerning the method of manifesting its acceptance of the contract. It failed to sign the agreement and failed to give notice -- an essential term -- to make the contract effective. Because the parties failed to form a contract in the first instance, the arbitration clause necessarily also did not come into existence. The trial court properly determined that no agreement to arbitrate existed, and therefore properly denied the broker's petition to compel arbitration.

4. Other Issues

The parties argued extensively below, the question whether, assuming the contract as a whole was valid, the agreement had nevertheless expired. The seller expressed the view that the contract had expired, and thus that the agreement to arbitrate was extinguished also. The broker asserted that the agreement had been extended.

In view of our holding that no contract had been formed, it is unnecessary to dwell further on the expiration and extension issue.

Finally, although the broker made some mention in the briefing concerning the trial court's failure to issue a statement of decision, it addresses no argument to the matter and makes no special claim of reversible error based upon its absence. We think the

circumstances adequately explain the matter: § 632 requires that a request for a statement of decision "specify those controverted issues" as to which the statement is desired. The broker's request for a statement of decision was general, and failed to specify the particular issues in which it was interested. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292.)

5. Disposition

The trial court correctly determined that there was no agreement to arbitrate, as the contract in general never came into being. The order denying the petition to compel arbitration is affirmed. Respondent is awarded its costs on appeal.

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/s/ GAUT
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ McKINSTER
J.